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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1002

FRITZ B. WAGOR, JOHN L. AVANT, et al.,
as Trustees of Dade County Construction Industry
Advancement Fund,

Petitioners,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Respondent

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

P. D. THOMSON
JOSEPH Z. FLEMING
Attorneys for Petitioners
Paul & Sams
1314 First National Bank Building
Miami, Florida 33131

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IN THE

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FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund,

Petitioners,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund ("Petitioners") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 17, 1967 and issued as its mandate on October 19, 1967 after denial of Petitioners' Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra* pp. 1a-6a; R., Vol. II, 69) is reported at 382 F.2d 813. The per curiam order denying Petitioners' Petition for Rehearing from such opinion (Appendix A, *infra* p. 7a; R., Vol. II, 83) is unreported. The Final Judgment for Respondent of the District Court (Appendix A, *infra* p. 10; R., Vol. I, 65) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1967, that Court denied Petitioners' Petition for Rehearing by per curiam order entered on October 11, 1967 and on October 19, 1967 that Court issued the Judgment of July 17, 1967 as its mandate (Appendix A, *infra* p. 8a; R., Vol. II, 75). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals held that an employer who did not formally execute a collective bargaining agreement negotiated by others can accept the benefits of that agreement but comply only with those obligations of the agreement which it wishes to assume and disregard all others. The Court of Appeals reached this decision not by formulating a substantive law of collective bargaining agreements, based on the national labor laws, but under common-law concepts of contracts, and in so doing sanctioned a criminal violation of one of the national labor laws.

Accordingly, the questions presented to this Court are:

1. Whether the Court of Appeals ignored the mandate of *Lincoln Mills (Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1959)) to fashion a "federal law from the policy of our national labor laws" by restricting this mandate to the issue of whether arbitration under a collective bargaining agreement should be ordered or enforced, rather than broad substantive matters involving the creation of a federal law for enforcement of collective bargaining agreements.

2. Whether the Court of Appeals in permitting Respondent to accept benefits of a collective bargaining agreement secured through multi-employer bargaining by employer associations, but to ignore the obligations of that agreement undermined the structure of employer associations and multi-employer bargaining and thereby frustrated the effort of the national labor laws to foster industrial peace and stability.

3. Whether the Court of Appeals in permitting Respondent to accept the benefits of an industry-wide collective bargaining agreement bu to ignore the obligations of that agreement destroyed the basis for industrial peace and stability.

4. Whether the Court of Appeals has sanctioned a criminal violation by Respondent of Section 302 of the Labor Management Relations Act of 1947.

STATUTES INVOLVED

The statutory provisions involved are Sections 1(b), 301(a), 302(a), 302(b), 302(c)(5)(B) and 302(d) of the Labor Management Relations Act of 1947 (the "LMRA"). These provisions are printed in Appendix B hereto.

STATEMENT OF THE CASE

This action was brought in the United States District Court, Southern District of Florida, invoking the jurisdiction of the District Court under Section 301 of the LMRA.

Petitioners are Trustees of the Dade County Construction Industry Advancement Fund (the "Industry Fund") established July 1, 1963 pursuant to the provisions of a collective bargaining agreement (the "Agreement") between the Carpenters' District Council of Miami, Florida and Vicinity (the "Union") and South Florida Chapter, The Associated General Contractors of America and Home Builders Association of South Florida (collectively referred to as the "Associations") (R., Vol. I, 19). The Associations, comprised of building contractors, negotiated the Agreement with the Union for the construction industry in Dade County, Florida. As the Court of Appeals noted, the contract "established working conditions, wages and fringe benefits for union carpenters employed in Dade County." Appendix A, *infra*, p. 2a, R., Vol. II, 69.

Respondent is a contractor, who while not a member of either of the Associations, employed union carpenters in Dade County.

Petitioners seek by this suit to require Respondent to make payments to the Industry Fund pursuant to the Agreement. Although it adopted the Agreement, Respondent has refused to make such payments.

The working conditions, wages and fringe benefits established by the Agreement (set forth at R., Vol. I, 19-33) consist of the wage scale itself (R., Vol. I, 21-24), fringe benefits (R., Vol. I, 25), payment to a Health and Welfare Fund for each employee hour worked (R., Vol. I, 28-29) and payment to the Industry Fund for each employee hour worked (R., Vol. I, 29-32).

The Health and Welfare Fund established under the Agreement was jointly administered by trustees appointed by the Union on one side and the Associations on the other and provides health and welfare benefits to carpenter employees of all participating employers. The Industry Fund is administered by trustees appointed by the Associations (the Union is barred by the provisions of Section 302 of the LMRA from jointly administering such a trust) and provides funds for specified purposes to advance the Dade County construction industry through promotional efforts on behalf of the entire construction industry. This Fund thus provides equal benefits to all employers engaged in the construction industry, whether members of the Associations or not and employees of all such employers (R., Vol. I, 30).

Respondent did not sign the Agreement. It did,

however, adopt the Agreement. The only way Respondent could get union carpenters was under the Agreement, which as the Court of Appeals noted "established . . . working conditions for union carpenters employed in Dade County". To get union carpenters Respondent adopted the Agreement and complied in all respects with the Agreement except for its requirement of payments to the Industry Fund for each employee hour worked. (R., Vol. I, 37).

Payments for the two funds were made by the contractor in one check to an escrow account (R., Vol. I, 28-29) on one reporting form entitled: "DADE COUNTY CONSTRUCTION EMPLOYEES HEALTH AND WELFARE FUND — CONSTRUCTION INDUSTRY ADVANCEMENT FUND." (R., Vol. I, 62). The form makes specific reference to, and incorporates, the Agreement (R., Vol. I, 63). Respondent used this form, thereby acknowledging that the payments were in accordance with the Agreement, but had a line drawn through the Industry Fund payment and limited its payment to the other funds required under the form (R., Vol. I, 62).

The provision for the Industry Fund was carefully negotiated and was integral to the Agreement. The requirement for payments to the Industry Fund is prefaced: "In consideration of the mutual premises and covenants expressed herein . . . " (R., Vol. I, 29). The Agreement further provides:

> " . . . the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or non-membership in said Associations; and no more favorable

terms or conditions will be given to any Employer during the term of this Agreement." (R., Vol. I, 27).

Nevertheless the District Court found as a matter of law that Respondent was not bound by the terms of the Agreement to make the payments to the Industry Fund required by the Agreement. The Court of Appeals affirmed this decision.

REASONS FOR GRANTING THE WRIT

Industrial stability requires that collective bargaining agreements negotiated by employer associations and unions for an industry be given effect in that industry. The Court of Appeals determined that an employer nonsigner of a collective bargaining agreement negotiated by others for the industry of which that employer is a part may avail itself of all the benefits of that agreement but selectively reject the obligations of the agreement. This decision destroys industry-wide bargaining agreements, minimizes the effectiveness of multi-employer associations and frustrates the industrial stability which the national labor laws have sought to foster. Therefore, it is in conflict with the national labor laws and nullifies the effect of this Court's mandate in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455-456 (1959) that Section 301 of the LMRA "expresses a federal policy that federal courts should enforce . . . [collective bargaining] agreements" by formulation of a " . . . substantive law . . . from the policy of our national labor laws." This decision of the Court of Appeals raises a question of great importance relating to the scope of the substantive law to be estab-

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lished pursuant to *Lincoln Mills* and to the effectuation of the Congressional policy of fostering industrial stability.

The decision of the Court of Appeals restricts *Lincoln Mills* to arbitration matters. In so doing, it ignores the mandate of *Lincoln Mills*. In addition, the decision of the Court of Appeals is in direct conflict with decisions of other Courts of Appeals, such as *Lewis v. Seanor Coal Company*, 382 F. 2d 437 (3rd Cir. 1967) following *Lincoln Mills* and acknowledging the duty to fashion a substantive law of collective bargaining agreements, based not on traditional contract law but on the policy of the national labor laws.

In addition, the decision of the Court of Appeals must be an erroneous application of the national labor laws which it was required to effectuate, in that the effect of the decision is to sanction a criminal violation by Respondent of Section 302 of the LMRA. A more erroneous creation of substantive law would be hard to imagine.

1. The decision of the Court of Appeals is in error because it destroys industrial stability by denying the integrity of an industry-wide collective bargaining agreement negotiated by employer associations and a union for that industry. It therefore is contrary to the *Lincoln Mills* mandate. *Lincoln Mills* enjoined the federal courts to enforce collective bargaining agreements in "that industrial peace can best be obtained only in that way." (*Id.* at 455). *Lincoln Mills* made clear that the carrying out of this federal policy, required by Section 301 of the LMRA, meant the formulation of a new federal law based on "the policy of our national labor laws" and principally derived from the LMRA, other labor statutes, legislative history

and policy. *Id.* at pp. 456-457. In so doing *Lincoln Mills* carried out the legislative purpose set forth in Section 1(b) of the LMRA to foster industrial stability.

The substantive law of collective bargaining agreements fashioned pursuant to the *Lincoln Mills* mandate must recognize that "a collective bargaining agreement is not an ordinary contract for the purchase of goods and services nor is it governed by the same old common-law concepts which control such private contracts". *Transportation-Communications Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160-161 (1966). The District Court and the Court of Appeals ignored these precepts and decided this case on "the same old common-law concepts which control . . . private contracts".

To date, virtually all cases arising under *Lincoln Mills* have dealt with the single issue of requiring or enforcing arbitration under a collective bargaining agreement. These decisions recognize that a collective bargaining agreement is the cornerstone of labor management stability. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The decision of the Court of Appeals, instead of promoting industry stability, destroys the industry-wide collective bargaining agreement. If any nonsigning employer may receive all benefits of an agreement, but may selectively reject its obligations, no employer will ever sign such an agreement. Certainly such a result is not in the interest of stabilizing labor-management relations through collective bargaining agreements.

The effect of the decision of the Court of Appeals is to stop the formulation of this new federal law at its first

stage of development. Since the requirement or enforcement of arbitration is itself only a means of giving further stability to collective bargaining agreements, limitation of *Lincoln Mills* to that single step refutes the very basis for *Lincoln Mills.*

In addition, the decision of the Court of Appeals is in direct conflict with the decisions of other courts, such as in *Lewis v. Seanor Coal Company,* (382 F. 2d 437 (3rd Cir. 1967).) In this case, which involved the validity of an oral agreement under Section 302 (c) (5) of the LMRA, the company attempted to dismiss a suit brought against it by trustees of a health and welfare fund on the grounds that the Union which was a party to that agreement had orally modified it. The court held that the disposition of the claim was controlled by the court's "duty . . . to fashion a body of federal common law for the enforcement of collective bargaining agreements," giving "particular emphasis . . . to the legislative history of labor legislation."

Here the Court of Appeals has rejected the requirement that it enforce the collective bargaining agreement. Instead, by reason of its erroneous interpretation of its obligations under *Lincoln Mills,* it has denied Petitioners' attempt to enforce the Agreement here involved.

2. The decision of the Court of Appeals is in error because it destroys industrial stability by denying any special validity to employer associations. This Court has determined that multi-employer bargaining through employer associations has not only been sanctioned by the national labor laws, but also is of sufficient importance that its protection against union attack warrants severe measures. Thus in *NLRB v. Truck Drivers Local 449,*

353 U.S. 87, 94-96 (1957), this Court concluded that Congress had recognized that, in many industries (one of them the construction industry here involved) multi-employer bargaining through employer associations is a vital factor in the effectuation of the national policy of promotion of labor peace through the strengthening of collective bargaining and protection of the multi-employer unit warrants locking out employees. This Court recently reaffirmed the principle of such protection of "multi-employer bargaining units." *NLRB v. Brown*, 380 U.S. 278, 289 (1965).

That multi-employer associations materially contribute to industrial stability has been recognized not only by this Court in these two cases, but also by most prominent authorities.

> "The wider the basis of discussion, the more likely it is that the negotiations will be in the hands of experienced leaders and that they will bring to their aid staffs of experts with pertinent data revealing the long range implications of the proposals discussed. In a word, better organization for bargaining means more intelligent and responsible negotiation on the part of management and labor alike. Much can be achieved, moreover, by an industry acting as a unit: it becomes possible to think of such problems as technological displacement on an industry basis and so to achieve social and economic gains that no company could undertake alone. Labor desires industry-wide bargaining, partly because it avoids wasting of manpower in successive negotiations with a number of employers partly be-

cause it may secure gains which no one employer can grant for fear of competitive disadvantage. It is doubtless also a factor that centralization strengthens the leaders' control. Many businessmen have come to the same conclusion for similar reasons: competitive disadvantages based on disparities in labor cost are reduced if not abolished; the industry as a whole can face strike threats which might be disastrous to a single employer through the loss of his market; the national officers of a union are likely to have a better understanding of management problems than local leaders and in industry-wide bargaining can keep extremists under some measure of control." Cox and Bok, *Labor Law*, 330-331 (1965 ed.).[1]

The sole contrary opinion appears to be that of the Court of Appeals in this case, an opinion reached in reliance on *a 1943 decision* of this Court *interpreting the Railway Labor Act.* It would seem hazardous at best to formulate national labor laws regulating collective bargaining agreements on the basis of a pre-Taft-Hartley judicial decision involving another statute. This certainly is not what *Lincoln Mills* demands.

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[1]For additional discussion of the benefits of employer associations see: *Report of the General Subcommittee on Labor, Committee on Education and Labor,* House of Representatives, 88th Cong., 2d Sess., Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process (Comm. Print) cited in *Publishers' Association of New York City* v. *NLRB,* 364 F. 2d 293, 296 n. 1 (2nd Cir. 1966); *Local No. 189, Amalgamated Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 713 n. 20 (1965) (Goldberg dissenting) (stating that congressional policy sanctions multi-employer bargaining); Labor Study Group of the Committee for Economic Development: *The Public Interest in National Labor Policy* 134-135 (1961) (a study group consisting of some of the most prominent names in the field recommended strengthening employer associations).

If the Court of Appeals decision stands Respondent has obtained all the benefits of belonging to an employer association without accepting any of the responsibilities. This gives employers who do not participate in such associations an option, to wait until negotiations are finished and then adopt an agreement negotiated by an employer association without accepting its concomitant obligations or, if such an agreement is not favorable, to try for a better one.[2] Employer associations are composed of competing individual employers. If the non-participating employer can both avoid the costs of participating in the association and obtain at least as good a contract as the association, it will acquire a competitive advantage.[3]

Such an advantage by itself impairs industrial stability. But in addition, the principle of multi-employer bargaining through employer associations is undermined. Paradoxically, the decision of the Court of Appeals thus undermines multi-employer bargaining units at the same time the National Labor Relations Board appears to be strengthening multi-union bargaining units.

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[2]Under decisional labor law the non-participating employer can always insist on receiving at least as good a contract as the associations negotiated, relying on the union practice of standardizing area agreements in the construction trades. An employer need not previously have entered into a formal agreement to make such a claim. *30th National Labor Relations Board Annual Report for the Fiscal Year Ended June 30, 1965*, 47 (1966). Even bargaining on an individual basis will normally not defeat this right in the non-participating employer. See *The Kroger Co.*, 148 NLRB 569, 573 (1965).

[3]The Associations here attempted to prevent such a competitive advantage by including a "most favored nations" clause in the Agreement. The Court of Appeals dismissed this clause as irrelevant (Appendix A, *infra* 6a) thereby sanctioning the competitive advantage which must result.

3. The decision of the Court of Appeals is manifestly erroneous as a formulation of a substantive law for enforcement of collective bargaining agreements in that its effect is to sanction a criminal violation of Section 302 of the Labor Management Relations Act. Section 302(a) of the LMRA prohibits payments by an employer, such as Respondent, to a union representative. Each union trustee of the Health and Welfare Fund created under the Agreement was a Union representative. Respondent made the payments required by the Agreement to the Health and Welfare Fund. Therefore, Respondent committed a violation of Section 302, unless its payments were made pursuant to the specific exceptions of Section 302(c)(5), and specifically the requirement of Section 302(c)(5)(B) that the payments were pursuant to a written contract. Such a violation would be a criminal violation under Section 302(d). *United States v. Ryan*, 350 U.S. 299, 305 (1956). Since Respondent did not *sign* any contract with the Union, the only written contract on which Respondent could rely in making its payments to the Health and Welfare Fund was the Agreement itself. But the Court of Appeals held that Respondent did not adopt the Agreement. Therefore, the decision of the Court of Appeals sanctions the criminality of the Respondent in making payments to the Health and Welfare Fund without being party to a written contract. This decision is in conflict with *Lewis v. Seanor Coal Company, supra*, which held that the effect of Section 302 had to be evaluated in reaching the appropriate result and rejected the validity of a claimed oral modification of a written contract because it would have constituted a violation of the legislative policy set forth in Section 302.

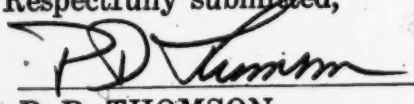
The decision of the Court of Appeals must be an

erroneous interpretation of the federal laws for enforcing collective bargaining agreements; particularly where the alternative — to find that Respondent did adopt the Agreement — furthers the scope and effect of the collective bargaining agreement and creates industrial stability.

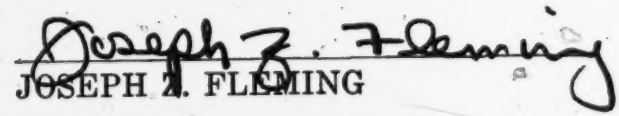
CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



P. D. THOMSON



JOSEPH Z. FLEMING

Attorneys for Petitioners
Paul & Sams
1314 First National Bank Building
Miami, Florida 33131

January, 1968

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23875

FRITZ B. WAGOR, JOHN L. AVANT, ET AL,
as Trustees of Dade County Construction
Industry Advancement Fund,

Appellants,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(July 17, 1967)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

LYNNE, District Judge: Appealing from a summary judgment entered in favor of appellee, Cal Kovens Con-

struction Corporation (Kovens), appellants, as Trustees of the Dade County Construction Industry Advancement Fund (Trustees), are here contending that the lower court erred in disregarding settled principles both of the common law of contracts and of the emerging national labor law.

There is no genuine issue as to any material fact. On July 1, 1963, a collective bargaining agreement was entered into between the Carpenters' District Council of Miami, Florida and Vicinity (Carpenters' Union) and South Florida Chapter, The Associated General Contractors of America, Inc. and Home Builders Association of South Florida (Associations). It established working conditions, wages and fringe benefits for union carpenters employed in Dade County.

With respect to benefits, especially noteworthy are provisions of the agreement requiring the employer to pay to the Dade County Construction Employees Health and Welfare Trust Fund (Health and Welfare Fund) ten cents for each hour worked by his employees and to the Dade County Construction Industry Advancement Fund (Industry Fund) two and one-half cents (increased to five cents after July 1, 1964) for each hour worked. The Health and Welfare Fund is jointly administered by trustees separately appointed by the Carpenters' Union and the Associations and provides health and welfare benefits to employees. The Industry Fund provides funds for specified purposes to advance the construction industry and is administered by the Trustees who are appointed exclusively by the Associations. The Carpenters' Union has no participation in or control over the Industry Fund and has no voice in determining how the funds therein are to be expended.

The Trustees lean heavily upon the provisions of paragraph 2, article VIII of the agreement which read as follows:

> "The parties hereby agree that the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or nonmembership in said Associations; and no more favorable terms or conditions will be given to any Employer during the term of this Agreement."

Kovens has never been a member of either Association; it has never designated either as its bargaining representative. It did not participate in the negotiation of nor did it sign such agreement. On the contrary, it elected to negotiate with the Union on its own. The resulting contract, though apparently never reduced to writing and formally executed, enabled it to employ union carpenters and required it to pay and provide identical wages and fringe benefits. It was not thereby required to make contributions to the Industry Fund.

Invoking the common law principles of ratification by acceptance and estoppel, appellants insist that appellee should be held to have adopted the contract negotiated by the Associations and to have breached its obligation to contribute to the Industry Fund. This contention will not withstand analysis. At no time did it deliberately enter into relations with the Carpenters' Union which were only consistent with the adoption of such contract. *Cf. Wiggins Ferry Co. v. O. & M. Railway*, 142 U.S. 396 (1892). On the contrary, its separate agreement with the Union, while providing for payments into the Health and Welfare Fund,

omitted any reference to contributions to the Industry Fund. Neither the Union nor its members have any interest in such fund, and appellants are not seeking to vindicate the rights of either. Moreover, inconsistent with the theory of adoption is the mute fact that it has never contributed to such fund. Thus, on its facts, this case is clearly distinguishable from *William Dunbar & Co. v. Painters and Glazers District Council*, 129 F.Supp. 417 (D.D.C. 1955), on which appellants misplace their chief reliance.

Adverting to the duty of the lower court to fashion the substantive law of this case from the policy of our national labor laws, as taught by *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1959) and its progeny, appellants complain that its decision herein undermines the industrial stability achieved through employer associations. They contend that there is a federal labor policy favoring multi-employer associations as collective bargaining units and that uniform conditions of employment are essential to their continued existence. Thus, their argument runs, they must be clothed with quasi-legislative authority to impose their collective bargaining agreements upon nonconsenting employers within the industry.

While there is nothing in the national labor laws reflecting adversely upon the existence of such units, *Labor Board v. Truck Drivers Union*, 353 U.S. 87 (1957), there is nothing which has been called to our attention, or which we have found, which prefers them to a non-member employer choosing to go it alone in negotiating with a labor union. Indeed, the signposts point in the opposite direction. For example, in *Terminal Assn. v. Trainmen*, 318 U.S. 1, 7 (1943), it was observed:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions . . . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

Again, in *Labor Board v. American Ins. Co.*, 343 U.S. 395 (1952), the Supreme Court made it clear that section 8(a) of the Labor-Management Relations Act (29 U.S.C.A. § 158(d) does not permit either the government or a union to impose unilaterally on an employer certain terms and conditions of employment. It follows, a fortiori, that it does not suffer the unilateral imposition of contractual obligations by an association of employers upon a nonmember, competing employer.

Any federal policy favoring the multi-employer bargaining unit over the individual employer electing to act alone or promoting uniform terms and conditions of employment for an entire industry must await its promulgation by the Congress. It cannot and must not be postulated by this court.

Insisting that payments made by Kovens into the Health and Welfare Fund under its informal agreement with the Carpenters' Union were in patent violation of 29 U.S.C.A. § 186, appellants urge us to absolve it of criminality by holding that in law, if not in fact, it became a

party to the written agreement negotiated by the Associations with such Union. The mere statement of this contention points up its lack of merit; it deserves no fuller discussion.

Finally, relying upon the above-quoted provisions of article VIII of their agreement with the Carpenters' Union, appellants argue that failure to require Kovens to contribute to the Industry Fund as a condition of its employment of union labor resulted in giving to it "more favorable terms or conditions" and constituted a clear breach of such agreement. But assuming, without deciding, that this is so, it does not follow that a breach of its contract by the Union may be transmuted into a contractual obligation which appellee expressly declined to assume.

The judgment of the district court was right. It is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23875

FRITZ B. WAGOR, JOHN L. AVANT, ET AL,
as Trustees of Dade County Construction
Industry Advancement Fund,
Appellants

vs.

CAL-KOVENS CONSTRUCTION CORPORATION,
Appellee

Appeal from the United States District Court for the Southern District of Florida

---

(October 11, 1967)

ON PETITION FOR REHEARING

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge

PER CURIAM:

In the preparation of its opinion the court gave careful consideration to the principles articulated in *Lewis v. Seanor Coal Co.*, F.2d , 66 LRRM 2007, 2010-2011 (3d Cir. 1967) and *Moglia v. Geoghegan*, 267 F.Supp. 641 (D.C. N.Y. 1967). The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23875

D. C. Docket No. 65-155-Civ-EC

FRITZ B. WAGOR, JOHN L. AVANT, ET AL.,
as Trustees of Dade County Construction
Industry Advancement Fund,
Appellants,

versus

CAL KOVENS CONSTRUCTION CORPORATION,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Fritz B. Wagor, John L. Avant, and others, as Trustees of Dade County Construction Industry Advancement Fund, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 17, 1967

Issued as Mandate: October 19, 1967

FINAL JUDGMENT FOR DEFENDANT

Filed May 23, 1966

In the United States District Court, in and for the Southern District of Florida, Miami Division.

Fritz B. Wagor, et al., *Plaintiffs*,

vs. No. 65-155-Civ-EC.

Cal Kovens Construction Corporation, a Florida corporation, *Defendant*,

This Cause came on to be heard on Motions for Summary Judgment and the Court entered its Summary Judgment in favor of the Defendant and against the Plaintiffs. Based thereon it is hereby

Considered, Ordered and Adjudged that Final Judgment be and the same is hereby entered in favor of the Defendant, Cal Kovens Construction Corporation, a Florida corporation, and against the Plaintiffs, Fritz B. Wagor, John L. Avant, William H. Bourne, Edward J. Gerrits, Allan W. Greenberg, Paul B. Martin, Sam Jennings, Jack Cook, C. C. Blake, Robert L. Turchin and Lowell B. Selby, as Trustees of Dade County Construction Industry Advancement Fund, a trust, and this cause is hereby dismissed with prejudice to the Plaintiffs.

Done and Ordered at Miami, Florida, this 21st day of May, 1966.

EMETT C. CHOATE,
Senior Judge, U. S. District Court.

APPENDIX B

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151, *et ceq*) are as follows:

> SEC. 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.
>
> * * * *
>
> SEC. 301(a) Suits for violation of contracts be-

tween an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

SEC. 302(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . .

* * * *

SEC. 302(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

SEC. 302(c)(5) The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial

umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

SEC. 302(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

LIBRARY
SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1062

FRITZ B. VAGGE, JOSEPH L. AVENT, et al., as Trustees of Dade County Construction Industry Advancement Trust,
Petitioners,
vs.
CAL KOVENS CONSTRUCTION CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1002

FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund,
Petitioners,

vs.

CAL KOVENS CONSTRUCTION CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

For the purposes of continuity, your respondent will refer to the parties and to the record by the same designations as indicated by the petitioners in the petition for writ of certiorari. Petitioners Fritz B. Wagor, John L. Avant, et al., as Trustees of Dade County Construction Industry Advancement Fund will be referred to as "petitioners" or

"Trustees". Respondent, Cal Kovens Construction Corporation, will be referred to as "Kovens." The Carpenters' District Council of Miami, Florida and Vicinity will be referred to as the "Union", and South Florida Chapter, The Associated General Contractors of America and Home Builders Association of South Florida will be collectively referred to as the "Associations." References to the record will be by the symbol "R", Volume number and page.

THE PETITION FOR CERTIORARI

The petitioners urge that certiorari should be granted in this cause for the reason that the opinion of the Fifth Circuit Court of Appeals tends to create instability in the construction industry, and in effect condones a criminal violation of the Labor-Management Relations Act, 29 USCA § 186. This same argument was advanced to the Court of Appeals on appeal from the decision of the United States District Court, Southern District of Florida. The Court of Appeals, by its opinion, rejected these contentions. Your respondent believes that on analysis this Court will reach the conclusion that the Court of Appeals' decision is eminently correct.

STATEMENT OF FACTS

In July, 1963, the Union and the Associations entered into a collective bargaining agreement (R., Vol. I, 19-32). Kovens was not, at any time pertinent to these proceedings, a member of either of the Associations, and never designated either of the Associations as its bargaining representative in connection with its dealings with the Union (R., Vol. I, 38).

The collective bargaining agreement itself recognizes that the Associations did not have the power or authority to

bind all general contractors in the South Florida area to said agreement. The collective bargaining agreement states:

> "For the purposes of this agreement the term 'employer' shall mean the person, firm or corporation *agreeing* to be bound by the terms of this agreement." (R., Vol. I, 29).

On the signature page of the collective bargaining agreement a space was provided for the Associations to sign as the designated bargaining representatives of its members. A space was provided for the signatures of other non-member employers who wished to accept the agreement (R., Vol. I, 33).

Kovens denied that it had ever executed or accepted the collective bargaining agreement (R., Vol. I, 9 and 16). The petitioners admitted that they did not have a copy of the collective bargaining agreement which had been signed by Kovens (R., Vol. I, 38). The employer Associations inserted in the collective bargaining agreement an article designated "Industry Promotion Fund," in which it was provided that employers were to contribute to said Fund a certain amount per hour per Union carpenter employed. This Fund is administered solely by trustees appointed by the Associations and is wholly controlled by the Associations (R., Vol. I, 29-30). The creation of such Fund was not requested or required by the Union in connection with its collective bargaining with the Associations. The Union stated that contributions to the Industry Promotion Fund was not a condition precedent, insofar as the Union was concerned, to the employment of Union labor (R., Vol. I, 15). The respondent has never contributed to such Industry Promotion Fund.

This cause was originally filed in the United States District Court, Southern District of Florida, seeking to re-

quire Kovens to make contributions to the Associations' Industry Promotion Fund. The United States District Court, Southern District of Florida, granted summary judgment for Kovens. The Court of Appeals, Fifth Circuit, affirmed that decision with opinion.

ARGUMENT IN OPPOSITION TO PETITION

(a) A New Labor Policy—

The thrust of petitioners' argument is that this Court should formulate a national labor policy that all employers in a designated industry should be required to be bound by the terms of a collective bargaining agreement negotiated by an industry association, even though certain employers are not members of the association and have not designated the association as its bargaining representative. No better rebuttal argument can be made to the petitioners' position than that contained in the opinion of the Court of Appeals, Fifth Circuit, in this cause, in which that Court held:

> "Adverting to the duty of the lower court to fashion the substantive law of this case from the policy of our national labor laws, as taught by *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1959) and its progeny, appellants complain that its decision herein undermines the industrial stability achieved through employer associations. They contend that there is a federal labor policy favoring multi-employer associations as collective bargaining units and that uniform conditions of employment are essential to their continued existence. Thus, their argument runs, they must be clothed with quasi-legislative authority to impose their collective bargaining agreements upon non-consenting employers within the industry.
>
> "While there is nothing in the national labor laws reflecting adversely upon the existence of such units, *Labor Board* v. *Truck Drivers Union,* 353 U.S. 87 (1957),

there is nothing which has been called to our attention, or which we have found, which prefers them to a non-member employer choosing to go it alone in negotiating with a labor union. Indeed, the signposts point in the opposite direction. For example, in *Terminal Assn.* v. *Trainmen,* 318 U.S. 1, 7 (1943). it was observed:

> " 'The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. . . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.'
>
> "Again, in *Labor Board* v. *American Ins. Co.,* 343 U.S. 395 (1952), the Supreme Court made it clear that section 8(a) of the Labor-Management Relations Act (29 U.S.C.A. § 158(d)) does not permit either the government or a union to impose unilaterally on an employer certain terms and conditions of employment. It follows, a fortiori, that it does not suffer the unilateral imposition of contractual obligations by an association of employers upon a nonmember, competing employer.
>
> "Any federal policy favoring the multi-employer bargaining unit over the individual employer electing to act alone or promoting uniform terms and conditions of employment for an entire industry must await its promulgation by the Congress. It cannot and must not be postulated by this court."

(b) Alleged Criminal Violation—

The argument of the petitioners, that the decision of the Court of Appeals, in effect, sanctions a criminal violation of § 302 of the Labor-Management Relations Act, 29 USCA § 186, is again answered by the opinion of the Court

of Appeals, Fifth Circuit, in this cause, wherein the Court held:

> "Insisting that payments made by Kovens into the Health and Welfare Fund under its informal agreement with the Carpenters' Union were in patent violation of 29 U.S.C.A. § 186, appellants urge us to absolve it of criminality by holding that in law, if not in fact, it became a party to the written agreement negotiated by the Associations with such Union. The mere statement of this contention points up its lack of merit; it deserves no fuller discussion."

In addition, your respondent in no way concedes that its actions have in any way violated 29 USCA § 186.

(c) Is Failure to Contribute a Breach of Contract—

The petitioners urge that failure to require Kovens to contribute to the Industry Promotion Fund sanctions a breach of the collective bargaining agreement between the Union and the Associations. The agreement provides, in paragraph 2 of article VIII, as follows:

> "The Parties hereby agree that the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or non-membership in said Associations; and no more favorable terms or conditions will be given to any employer during the term of this Agreement." (R., Vol. I, 27).

The Court of Appeals' answer to this argument was:

> "Finally, relying upon the above-quoted provisions of article VIII of their agreement with the Carpenters' Union, appellants argue that failure to require Kovens to contribute to the Industry Fund as a condition of its employment of union labor resulted in giving to it 'more favorable terms or conditions' and constituted a clear breach of such agreement. But assuming,

without deciding, that this is so, it does not follow that a breach of its contract by the Union may be transmuted into a contractual obligation which appellee expressly declined to assume."

In addition, there is no showing in this record that the above quoted provision has been breached in any way by the Union. The Union is charging Kovens the same wage scale and fringe benefits as are required to be paid by the Associations' members under the Associations' agreement with the Union. The only thing that Kovens is not paying, that the Associations' members are paying, is the money that goes into the Associations' private Industry Promotion Fund. As stated before, payment into the Industry Promotion Fund was never a requirement, nor even a request, of the Union in connection with fixing the wage scale and fringe benefits the Union was willing to accept in its collective bargaining with the Associations, and it is not a prerequisite demanded by the Union for the employment of Union labor. It is a tribute sought to be exacted by an industry association for its private benefit from non-members.

CONCLUSION

The Court of Appeals, in its opinion, only decided that this respondent-employer was not required to contribute to the Associations' promotion fund, since it was not a member of the Associations, and had neither designated the Associations as its bargaining representative nor executed the agreement made by the Associations and the Union.

There can be no more validity to petitioners' position in attempting to force respondent to contribute to its Industry Promotion Fund than if the respondent and other

non-Association member employers signed an agreement with the Union providing that employers shall pay into the "Kovens Promotion Fund" five cents per hour for every Union carpenter employed, and then sued the Associations to require contributions. The fallacy of their position is apparent.

It is respectfully submitted that the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

.....

ROBERT C. WARD

SIBLEY, GIBLIN, LEVENSON & WARD
Attorneys for Respondent
605 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing brief in opposition to petition for writ of certiorari was furnished (by mail) to the petitioners' attorneys, Messrs. Paul and Sams, 1314 First National Bank Building, Miami, Florida 33131, on February ....., 1968.

.....

ROBERT C. WARD